NO. 95-1771

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS PIERCE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Court of Appeals
Eighth Judicial District

REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

First off, the Court should understand the various findings made by the trial Judge, which formed the basis for his granting the Motion to Suppress, were not determined to be clearly erroneous. Not only this, and not unlike the Court of Appeals (which reversed the grant of the petitioner's Motion to Suppress), counsel-opposite in his flawed formulation of the facts makes and relies on a number of totally indefensible statements. For example, it is said:

(1)

> In addition, after the initial stop was made, [a] *the police determined*[1] *that the driver, petitioner, who was not the owner and an admitted fugitive with a fake driver's license, was unable to produce vehicle registration, certificate of title or any other proof of ownership*. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. [b] Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy.

Brief In Opposition, p. 24. And, it is said:

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[1] Of course, the Record shows the trial Court *did not* make any findings that even slightly tended to form even a slight basis for any of the assertions relied on by counsel *in any* of his substantive arguments.

(2)

The police found no evidence of car ownership. When the driver was asked by the (ticketing) officer for identification, [c] petitioner produced the Ohio driver's license in the name of Robert Hale, [d] which petitioner admitted was a fake permit used by petitioner to evade apprehension and extradition resulting from his then status as a fugitive. Petitioner had over $900 in his possession and a pager (to receive calls). Petitioner [e] claimed that there was evidence of ownership in the glove compartment without disclosing what that evidence was. Both Detectives Petrovich and Walker, singly and separately, searched the glove box and found "some kind of duplication of an application of receipt for a 30-day tag of the State of Ohio." Finding no satisfactory evidence of car ownership or identity of driver, Petrovich followed police procedure by impounding the car to inventory it.

Id., p. 26.

The point here of critical significance turns on the fact that, neither, the facts in the Record or the trial Court's findings support the critical premises in the two statements

quoted above. Not only is there the lack of any evidentiary basis in the Record for either of these quoted statements, they are actually contrary to certain critical findings made by the trial Judge. These findings, in addition to not being clearly erroneous, were not even challenged in the Court of Appeals.

With this being so, the categorical statement that the police knew Thomas Pierce was a "fugitive with a fake driver's license" ***before*** they decided to tow the car is not only indefensible and spurious, it is a gross misrepresentation of the Record and the facts therein.

Likewise in this false fact category is a further tortured version of the facts that lies at the heart of various premises that are indispensable to the State's central thesis. Here it is said that:

> After the occupants had been *searched*, the police questioned petitioner as to the ownership of the vehicle. At this point, petitioner produced an Ohio driver's license in the name of Robert Hale. *Petitioner later*[2] *explained that he was a fugitive from the State of Pennsylvania and was trying to evade apprehension and extradition.* Petitioner told the police that the automobile belonged to his girlfriend, Fransheria Cannon, and

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[2] The word "later," as here used by the State is in the sense that Petitioner made these statements *before* he was arrested and before the car was searched. There is nothing in the Record that supports this contention.

that there was sufficient proof of ownership for the vehicle in the glove compartment.

Id., p. 3. (Emphasis supplied.)

II

It is true that Thomas Hale (as the driver's license petitioner possessed showed him to be) later, but only after he and his passengers had been arrested and delivered to the police station, revealed his true name and told the officer that the driver's license was a fake and that he was a fugitive from Pennsylvania. This he did only after he had been arrested for the contraband found in the car. Petitioner testified he did this because of his responsibility for everything in the car and the fact that his passengers were unaware of its presence. He also testified he believed even then this search was illegal and expressed this opinion to the police. This he testified was so because he had indeed won a case in Pennsylvania because of an illegal search.

With all this being so, particularly since the trial Court fully credited Thomas Pierce's testimony on these points, these particular factual allegations made by the State are thus exposed as a desperate effort to have this Court do what the Court of Appeals did. Simply put, that is, artificially create facts in order to flesh out its prejudged conclusion as to how this case should come out. Surely this Court will not allow this to happen.

Also, counsel-opposite would simply have this Court ignore other findings made by the trial Court which cannot be, and were not, disputed by the State in the Court of Appeals. This incontrovertible fact not only exposes the State's thesis on these points to be outlandish, it also exposes a gross willingness on counsel's part to distort the Record because the Ohio Court of Appeals was able to do so to the satisfaction of the Ohio Supreme Court, which

denied petitioner further appellate review.

For what it is worth, the contention is here being made that this case points up the extreme advantages and confidences prosecutors in Ohio (particularly in Cleveland) have in their ability to successfully manipulate the facts and any findings of fact made that are not consistent with their thesis. What is surprising is for this counsel to learn from this case they would attempt to do so at this level.

III

Next, it is quite true that Detective Walker testified he had heard (**Brief in Opposition, p. 3**) from a mutual acquaintance that Nathaniel Flowers (a passenger in petitioner's car) was involved with drugs. However, the friend denied telling him such was the case. Flowers likewise denied having ever been involved with drugs. And, we are even willing to concede the original stop was justified -- as the trial Court determined.

However, the trial Court also determined, contrary to the State's false assertion, that the actual search of the occupants was commenced as soon as they were ordered out of the car at gunpoint. And, the trial Court determined the search made of the car was illegal. He also rejected the inventory theory counsel-opposite continues to rave about.

With this being so, it is well understood why counsel-opposite would fail to recognize the finding made by the trial Court with reference to the police "remov[ing] petitioner's wallet ...., which was placed on the front hood of the automobile" (**id., p. 3**). Simply put, crediting this fact is inconsistent with the State's thesis that the arrest occurred later and that the contraband was found during an inventory search. Further, the trial Court credited the conduct of the police in doing this and a number of other brazen things as being clearly indicative that petitioner and the others were immediately arrested -- and that their arrests were made without probable cause -- indeed were

pretextual.

Yet counsel, despite the trial Court's rulings, which were not clearly erroneous, would tell this Court petitioner and the others were simply "ordered" from the car and a "pat-down search" was originally conducted (id., p. 3).

Also one does not have to wonder why counsel would, despite contrary evidence in the Record which was credited by the trial Judge, try to convince this Court that petitioner told the police *before* the weapon (concealed under the carpet of the rear seat) or the drugs (concealed in the trunk of the car) were found that he was a fugitive and the driver's license was a fake.

On this point, the incontrovertible fact is the trial Court credited petitioner's testimony that he told the police these things after he and the others had been transported to the police station, miles away and that these statements were made after the contraband items had been found.

Indeed, the Court specifically credited Pierce's testimony that he only told the police these things in the hope the police would understand that the passengers in the car were unaware of the items that had by then already been found.

Now it is true (as counsel argues) that two of the detectives testified they could not find upon checking the glove box any evidence of ownership (id., p. 3). But this is hardly the critical fact. The trial Court *expressly* found, based on the testimony of the defense witnesses, that proof of ownership of the car was in the glove box. Indeed, a third officer testified she saw the envelope these items were in. She says she did not bother to look inside of it.

So postured, it is clear to us that before the prosecutor can offer as facts anything contrary to any of the trial Court's findings, a determination must be made that the findings involved were "clearly erroneous". Now

we do concede that Detective Walker testified at length, as counsel opposite shows in the almost seventeen (17) pages thereof quoted in his Brief. What counsel fails to reckon with, in this regard, is the categorical fact that the trial Court in making his findings of fact, which aptly premised his conclusions, totally and decisively rejected those segments of Walker's testimony counsel would bombard this Court with.

The same is true of counsel's efforts to force the searches actually made here into an inventory format. Doubtless this was done by counsel in the hope this Court would docilely ignore the critical facts here. Simply put, the fact is the inventory theory was rejected by the trial Court for a number of reasons. Not the least of which was because he found the arrests were illegal. Indeed, to argue otherwise one would have to exercise a penchant for manipulating facts at least to the degree Detective Walker was shown to have been capable of.

Next, it should be noted that, as shown in our Petition, this officer testified at the Preliminary Hearing that the original arrest was made after Detective McCauley saw a gun protruding from under the floor mat in the rear seat. Detective McCauley, who was not present when this Preliminary Hearing testimony was given, denied this was so. So postured, the fact that counsel would gospelize Detective Walker's testimony should tell the Court a lot about the quality of the State's evidence and the credibility of its witnesses. It also exposes some of the reasons why the trial Court rejected, as was his prerogative, the testimony of this officer and others.

IV

A further aspect of counsel opposite's flawed reasoning is exposed in the specious argument that "operating a motor vehicle with fictitious license plates is a serious infraction that warranted the stop" (id., p. 24) by

eight armed police officers who brandished their guns and ordered the people from the car. The fact that counsel did not explain to this Court that the ordinance offense for which the stop was ostensibly made is classified as a third degree misdemeanor is hardly a non-factor in these circumstances.

Next, in assailing the trial Court's findings, which are clear enough (in spite of counsel opposite's flawed effort to capsule them in his Brief In Opposition), counsel again tells us "the police found no evidence of car ownership" (id., p. 26). And, we are told (as though the trial Court so held) that it was in the wake of this failure that the car was impounded and inventoried (ibid).

Still another gem in counsel opposite's reasoning emerges from the number of averments offered as a reasoned basis for determining that the arrest and searches made here were lawful. Here, counsel tells us (in paragraphs 6-8, **Brief In Opposition**, p. 29) that when stopped *Thomas Pierce gave* the police the Hale driver's license. Actually *Detective Petrovich obtained* the driver's license with the name Robert Hale *after* all the items had been removed from Pierce's pockets. He then issued a ticket in the "Hale" name for operating a car with plates that were not issued for the car being driven. And, we are told that there on the scene (before the car was searched) Pierce first told the officers he had won an illegal search case in Pennsylvania. This is inconsistent with him telling them his driver's license was a fake before the car was searched. Further, we are told that after this (paragraph 9) Pierce then tried to justify the use of the plates by stating that the papers showing this was so were in the glove box and we are told that it was only after the police failed to find any ownership papers (paragraph 13) that the car was searched.

Aside from the ridiculousness, and the speciousness

of the above rationale, it also clashes both, with findings made by the trial Judge, the Record and any sense of logical reality.

CONCLUSION

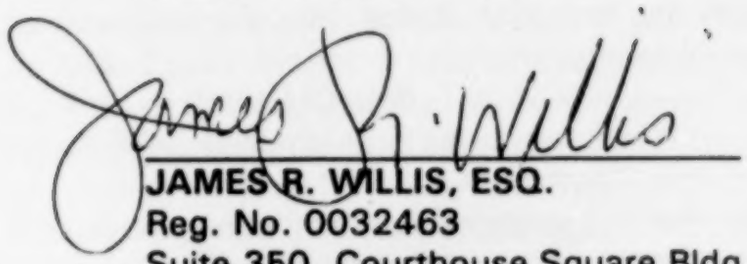
What cannot be over-emphasized here is the showing that the Court of Appeals failed to reject, qualify, or (for that matter) even reckon with various crucial findings of fact made by the trial Court en route to its decision granting Petitioner's Motion To Suppress. Rather than meet these findings head on, the Court of Appeals vented its penchant for imaginative fact finding. This it did in order to justify what it apparently regarded as a proper disposition for this drug case.

Clearly this must be so, for there can be no explanation, none whatsoever, for the Appeals Court (in its Opinion) or the State (in its Brief) not dealing with the findings made by the trial Judge. This is particularly so since the findings made by the trial Judge were fact based. When this is so, and surely would be the case if the shoe were on the other foot, reviewing Courts are barred from indulging in their own brand of fact creation.

With this being so, counsel-opposite's reliance on, and embellishment of, the pseudo-findings made by the Appeals Court should not carry the day for the State in this case. Stated another way, while counsel-opposite would view the findings made by the Appeals Court as though they sprang from some sort of oracle, or Justinian-like force, surely this Court will not fail to recognize that the role of the Court of Appeals was clearly violated here.

Because this is so, it follows that Petitioner does not ask too much when he asks this Court to vindicate his Fourth Amendment rights. These rights were violated by the Court of Appeals when it chose to substitute its own notions as to how this case should have been decided for the fact-based decision made by the original trier-of-fact.

Respectfully submitted,



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